

SERVICE DATE – MAY 22, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36178

METROPOLITAN COUNCIL—PETITION FOR DECLARATORY ORDER

Decided: May 21, 2018

On April 4, 2018, the Metropolitan Council (the Council), a political subdivision of the State of Minnesota, filed a petition for a declaratory order asking the Board to declare that certain transactions among the Council, Hennepin County Regional Railroad Authority (HCRRA), and Soo Line Railroad Company d/b/a Canadian Pacific Railway Company (CP) do not require Board authorization under the line of precedent beginning with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991) and will not result in the Council becoming a rail common carrier. (Pet. for Declaratory Order 1.)

The Council states that it is managing the planning and future construction of the Southwest Light Rail Transit project that will, when completed, provide light rail transit service in the cities of Minneapolis, St. Louis Park, Hopkins, Minnetonka, and Eden Prairie. (Id. at 1-2.) According to the Council, in order to accomplish this, it will be necessary for the Council to acquire the Kenilworth Corridor, a 2.6-mile segment of rail line and rail right-of-way owned by HCRRA, and the Bass Lake Spur, a 6.7-mile-long track and rail right-of-way owned by CP. (Id. at 2.) The Council asserts that it does not intend to become a rail carrier and proposes, based on the State of Maine line of cases, to acquire only the physical assets of these properties, while HCRRA would retain a permanent freight easement to provide common carrier service over the Kenilworth Corridor and would obtain from CP a permanent freight easement to provide common carrier service over the Bass Lake Spur. (See id.)¹

On April 24, 2018, Twin Cities & Western Railroad Company (TCW), which operates over the Kenilworth Corridor and the Bass Lake Spur pursuant to overhead trackage rights, submitted initial comments on the Council's declaratory order petition. TCW argues, among

¹ On April 5, 2018, HCRRA filed, in Docket No. FD 36177, a verified notice of exemption to acquire from CP a permanent, exclusive rail freight operating easement over the Bass Lake Spur. Twin Cities & Western Railroad Company filed a petition to reject or stay that notice of exemption on April 24, 2018, and HCRRA replied in opposition on May 2, 2018. By decision served on May 3, 2018, the effectiveness of the exemption was postponed until further order of the Board.

other things, that (1) the transactions do not satisfy State of Maine requirements; (2) the Board should hold this docket in abeyance pending the outcome of a proceeding that TCW initiated on April 24, 2018, before the U.S. District Court for the District of Minnesota; and (3) if it does not dismiss the petition outright or hold the case in abeyance, the Board should institute a procedural schedule and provide for discovery and public comment. (See TCW Initial Comments 1-3.)² More than 30 shippers, municipalities, and other stakeholders have filed letters expressing concerns about the proposed transactions and describing the importance of service provided by TCW.³ Additionally, U.S. Representatives Collin C. Peterson and Jason Lewis, both of Minnesota, submitted letters requesting a public comment period and careful consideration of the issues by the Board.

On May 2, 2018, the Council filed a reply to TCW's initial comments. The Council argues, among other things, that (1) the transactions do satisfy State of Maine requirements; (2) the case should not be held in abeyance; and (3) based on the pleadings already submitted, the Board has a complete record on which to address the petition for declaratory order. (See Council Reply 2, 6-15, May 2, 2018.)

TCW's request to dismiss the petition outright, (see TCW Initial Comments 2, 7, 14, 19), will not be granted at this time. Instead, the Board will seek further information and record development, as discussed below.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or to remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Pursuant to the Board's authority under § 554(e) and § 1321, a proceeding will be instituted to resolve the controversy and remove the uncertainty concerning the transactions at issue here.

The filings already received will be treated as opening statements. Reply statements from all parties will be due by June 21, 2018. In light of the significance of the transactions at issue here and the widespread public interest in them, the proceeding will be opened to public comment. Public comments will also be due by June 21, 2018.

Replies and comments may address any relevant issue, but the Board seeks further information and analysis regarding the following specific issues.

² On May 17, 2018, TCW submitted rebuttal comments reiterating and elaborating on several of these points.

³ On April 24, 2018, HCRRA submitted a letter asking the Board to disregard the requests in these letters, which HCRRA states are unsubstantiated and speculative.

1. What steps, if any, would need to be taken with respect to the transaction agreements for which the Council seeks a State of Maine declaratory order in order to appropriately protect TCW's interests? Are there changes that could bring the parties to common ground? The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. If the parties are amenable to Board-sponsored mediation, they are requested to so inform the Board.

2. What is the effect on the State of Maine analysis, if any, of HCRRA's exemption from Subtitle IV of Title 49 of the United States Code? See Chi. & N.W. Transp. Co.—Aban. & Discontinuance of Serv.—in Hennepin Cty., Minn., AB 1 (Sub-No. 252X), slip op. at 2-3 (ICC served Dec. 20, 1995) (granting HCRRA an exemption from Subtitle IV with respect to the Kenilworth Corridor).

3. What is the effect on the State of Maine analysis, if any, of Section 1(a)(2) of the Joint Powers Agreement between the Council and HCRRA? (See Pet. for Declaratory Order, Attachment 2, Ex. 4c, § 1(a)(2) (“The purpose of this Agreement is . . . to assign responsibility to the Council for administering on behalf of HCRRA . . . HCRRA's performance of the Common Carrier Obligation”).)

4. What is the effect on the State of Maine analysis, if any, of the presence of a second easement holder, i.e., TCW? (See Pet. for Declaratory Order, Attachment 2, Ex. 4d at 25 (granting TCW an easement over the Kenilworth Corridor).) See also V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 10 n.14 (STB served July 12, 2012); City of Denver—Acquis. Exemption—W. Stock Show Ass'n, FD 36157, slip op. at 2 (STB served Mar. 23, 2018).

5. Should operational impacts on TCW be considered as part of the State of Maine analysis? If so, should they be considered as a result of treating TCW as the State of Maine “carrier,” as opposed to HCRRA? (See TCW Initial Comments 17, 19.) Alternatively, should they be considered due to TCW's status as an overhead trackage rights operator? What specific operational impacts would the transactions have on TCW, if any—for example, due to loss of sidings or due to the narrowness of the corridor and shared uses? Record development and analysis regarding interference with TCW operations should be limited to operational effects resulting from the transaction agreements for which the Council seeks a State of Maine declaratory order.

In addition, the Council must submit an operations and maintenance agreement between the Council and HCRRA. (See Pet. for Declaratory Order, Attachment 2, § 4.1 (“The Parties agree to timely enter into the HCRRA OMA governing the associated uses, maintenance, upkeep and capital repairs”).) See, e.g., Md. Transit Admin.—Pet. for Declaratory Order, FD 34975, slip op. at 5-7 (STB served Oct. 9, 2007) (evaluating an operating agreement as a primary source for State of Maine analysis). The Council will be directed to submit this agreement by June 5, 2018.

The proceeding will not be held in abeyance pending the outcome of TCW's federal court action, which was initiated after this declaratory order case was initiated.

Finally, discovery will not be permitted. TCW does not explain why discovery is necessary here, and the Board generally does not provide for discovery in a declaratory order proceeding. See, e.g., Ill. State Toll Highway Auth.—Pet. for Declaratory Order, FD 36075, slip op. at 3 (STB served Jan. 17, 2017); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 2 n.1 (STB served Dec. 12, 2012).

It is ordered:

1. A declaratory order proceeding is instituted.
2. Reply statements are due by June 21, 2018.
3. Public comments are due by June 21, 2018.
4. The Council is directed to submit an operations and maintenance agreement between the Council and HCRRA by June 5, 2018.
5. TCW's request to hold the proceeding in abeyance is denied.
6. TCW's request for discovery is denied.
7. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.